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Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-1313

DR. ROBERT E. HAM, ET AL, *Petitioners*

v.

GEORGE ROMNEY, ET AL, *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT, CITY OF HOUSTON, TEXAS, IN OPPOSITION

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---

BRIEF FOR RESPONDENT, CITY OF HOUSTON, TEXAS, IN OPPOSITION

To The Honorable Supreme Court Of The United States:

Comes now the City of Houston, Texas, a respondent herein, and files this, its brief in opposition to Petitioners' petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, and would show the Court:

JURISDICTION

Petitioners have sought to invoke the jurisdiction of this Court under 28 U.S.C.A. §1954(1). However, this Respondent questions whether Petitioners have met the jurisdictional requirement guidelines for Writs of Certiorari imposed by Rule 19, *Revised Rules of the Supreme Court of the United States,* in that this Court, in *Snyder v. Harris,* 394 U.S. 332, 89 S.Ct. 1053 (1969), has held contrary to Petitioners' contentions here postulated.

QUESTIONS PRESENTED

I.

Whether the claims of individual land owners for damages to their real estate alleged to have resulted from certain actions and threatened actions of the various Respondents here can be aggregated to satisfy the jurisdictional sum of $10,000 required by 42 U.S.C.A. §1331, when no one member of the class Petitioners seek to create is alleged to have suffered damages in the jurisdictional amount.

II.

Notwithstanding the issue of jurisdiction, insofar as Respondent, City of Houston, is concerned, whether the judgments of the District Court and Court of Appeals were correct because Petitioner stated no claim upon which the United States District Court could grant relief against said City.

STATEMENT OF THE CASE

The Petitioners here seek to create a Rule 23 "class" out of the homeowners in a residential subdivision, alleg-

ing that, "collectively," they have been injured, through diminution in the value of their homes, in the amount of $1,200,000.00, "calculated at $1,000 per home," all as the result of the construction of a so-called "Section 236" project, for which the Respondent, City of Houston, had issued building permits.

In addition, as against Respondent, City of Houston, Petitioners prayed that it "be ordered to provide better sewage to accommodate the present 96 units and other inhabitants in that area, and that the . . . City of Houston be enjoined and restrained from issuing any further building permits to any individual, corporation, association, or person for construction of any apartments in the area of Meadowcreek Village and in particular, for units built under what is commonly [called] a 236 project."

BRIEF OF THE ARGUMENT

QUESTION I
(Restated)

Whether the claims of individual land owners for damages to their real estate alleged to have resulted from certain actions and threatened actions of the various Respondents here can be aggregated to satisfy the jurisdictional sum of $10,000 required by 42 U.S.C.A. §1331, when no one member of the class Petitioners seek to create is alleged to have suffered damages in the jurisdictional amount.

* * *

On all fours with the question here presented is *Alfonso v. Hillsborough County Aviation Authority*, 308 F.2d 724

(U.S.C.A., 5th Cir. 1962). There, a group of property owners alleged their homes were damaged because of nuisances, so-called, generated by the airport in question which was located near their homes. They sought to create federal jurisdiction by calling themselves a "class" under Rule 23 (before amendment) and alleged each member of this "class" suffered damage "in excess of $4,000", and that the combined sum of all their damages exceeded the necessary $10,000 jurisdictional amount. The Court of Appeals held that the claims of the individual home owners were separate and distinct and, citing the leading case of *Pinel v. Pinel,* 240 U.S. 594, 36 S.Ct. 416 (1916), said:

> "Assuming that this is a class action properly brought under Rule 23(a) (3), it is still requisite, if the claims of the plaintiffs be separate and distinct, that each must allege the jurisdictional amount." (308 F.2d 726)

The Court determined that the claims of the individual home owners were "separate and distinct", ergo, no class action would be maintainable without each claiming the jurisdictional amount.

In the case at bar, as was the situation in *Alfonso,* the claims of the various "class members" are also separate and distinct. Assuming, arguendo, the activities of Respondents, or any of them, actually damaged Petitioner Ham's property in the sum of $1,000, it would not follow that Class member John Doe's property would be equally damaged, nor would he and Ham have any interest or right to share in each other's recovery. Likewise, each would have the burden of showing the amount his own particular property was "damaged" (reduced in market

value) by the nuisance in question. If *Alfonso* is still the rule of decision in cases such as that at bar, Petitioners cannot prevail.

In 1966, however, and subsequent to *Alfonso,* Rule 23 was amended; thereby, Petitioners claim, the teachings of that case have been rendered inapposite. By such a position, they perforce have not acknowledged the very recent holding of this Court in *Snyder v. Harris,* 394 U.S. 332, 89 S.Ct. 1053 (1969), in which the question of aggregation was reconsidered in the frame of reference presented by that amendment to Rule 23:

> "The issue presented by these two cases [covered by the one opinion in Synder] is whether separate and distinct claims presented by and for various claimants in a class action may be added together to provide the $10,000 jurisdictional amount in controversy." (394 U.S. 333, 89 S.Ct. 1055)

Again aggregation in the manner here sought by Petitioners was disallowed. The Court discussed the 1966 amendment which, it said, sought to replace the old categories of class actions, i.e., "true", "hybrid", and "spurious", with a "functional approach" to class actions. However, insofar as the question of whether the amendment would permit aggregation of claims to attain the jurisdictional amount, the Court held that such jurisdictional *"amount in controversy"* is set by the Congress, not by a Rule of Civil Procedure:

> "The doctrine that separate and distinct claims could not be aggregated was never, and is not now, based upon the categories of old Rule 23 or any rule of

> procedure.[1] That doctrine is based rather upon this Court's interpretation of the statutory phrase 'matter in controversy'." (394 U.S. 336, 89 S.Ct. 1057)

Since this Court has so recently considered the question presented by the case at bar, and has held adversely to Petitioners' position, it is felt that it would impose upon the time of a busy Court further to belabor the question. Consequently, based upon the teachings of *Snyder*, Respondent, City of Houston, respectfully submits that since none of the Petitioners has alleged damages within the jurisdictional amount required by 28 U.S.C.A. § 1331, the District Court below properly held that it did not have jurisdiction of the controversy.

II.

Notwithstanding the issue of jurisdiction, insofar as Respondent, City of Houston, is concerned, whether the judgments of the District Court and Court of Appeals were correct because Petitioner stated no claim upon which the United States District Court could grant relief against said City.

* * *

The District Court's judgment should be affirmed if the decision is correct, even though, arguendo, wrong reasons are given for the holding. In other words, assuming, without agreeing, that the District Court's rationale be incorrect and the various claims can be aggregated to a

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1. Indeed, as the Supreme Court itself pointed out, Rule 82 provides that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts." (394 U.S. 337, 89 S.Ct. 1057). Is not Rule 82 of equal dignity with Rule 23?

figure in excess of $10,000.00, nonetheless, if there are other valid bases upon which the result reached by the District Court can be bottomed, the judgment in favor of Respondent City, at least, should be affirmed notwithstanding. *Helvering v. Gowan*, 302 U.S. 238, 245, 58 S.Ct. 154, 158 (1937); *Securities and Exchange Commission v. Chenery Corp.*, 317 U.S. 80, 88, 63 S.Ct. 454, 459 (1943); *Lum Wan v. Esperdy*, 321 F.2d 123, 125-126 (U.S.C.A., 2nd Cir., 1963). There are such valid bases here, as no claim has been put forth upon which relief could be granted against the City in a federal court, class action or not.

If not actually controlling, *it is persuasively significant* that 42 U.S.C.A. §§ 1983, 1985, were not invoked for jurisdictional purposes, and that no violation of "civil rights" has been alleged,[2] nor has any allegation of racial bias, invidious or otherwise, been charged against the City, nor any discrimination due to sex, poverty, or that the geographical area in question qualified as a "ghetto", so-called.[3] Hence, there is nothing about the City's acts,

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2. 42 U.S.C.A. §§1983, 1985 provide a remedy *exclusive* of any by state law. *Hall v. Garson*, 430 F.2d 430 (U.S.C.A., 5th Cir. 1970); Also, *Burnett v. Short*, 441 F.2d 405 (U.S.C.A., 5th Cir. 1971). Hence, an invocation of those statutes would have cast Petitioners loose from dependence upon state remedies which this Respondent proposes to show are unavailable to Petitioners under the state of their pleadings.

3. Making the fact situation here different from that before the Fifth Circuit, in *Hawkins v. Town of Shaw, Miss.*, 437 F.2d 1286 (U.S.C.A., 5th Cir., 1971), where the Court ordered a city to "submit a plan for the Court's approval detailing how it proposes to cure the results of the *long history of discrimination* which the record reveals." (437 F.2d 1293, emphasis added). The situation at bar is also distinguishable, for like reasons, from *Hadnott v. City of Prattville*, 309 F.Supp. 967 (U.S.D.C., M.D., Ala. 1970). Compare, however, *Hawkins* with *Palmer v. Thompson*, 403 U.S. 217, 91 S.Ct. 1940 (1971) where the Supreme Court refused to overturn the action of

complained of, to make them "*suspect*" so as to put the City under a greater burden than that imposed upon an ordinary defendant. Concomitantly, federal cases treating of municipal services, or the lack of adequacy thereof, should be reviewed with the foregoing in mind.

In *Kirschke v. City of Houston*, 330 S.W.2d 629 (Tex. Civ. App. 1959, error ref. n.r.e., appeal denied, 364 U.S. 474, 81 S.Ct. 242 [1960]), Kirschke sued the City for damages alleged to have been sustained as a result of the City allegedly wrongfully withholding a building permit. The Texas Court denied him any relief, reciting as a reason therefor the following quotation from McQuillin, *The Law of Municipal Corporations*, (3rd Ed.), § 26.98:

> "No cause of action for damages against a city or its officers can arise from the grant or denial of a license or permit or from any action or omission with respect thereto, since the issuance of a license or permit is a governmental function." (330 S.W.2d 633).

Certiorari was sought but the U. S. Supreme Court held, per curiam:

> "The appeal herein is dismissed for the reason that the judgment of the Supreme Court of Texas, sought here to be reviewed, is based upon a nonfederal ground adequate to support it." (364 U.S. 474, 81 S.Ct. 242).

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the city in closing all its municipally owned swimming pools, thereby denying both races public swimming facilities. A distinction might be made in the fact that, as Mr. Justice Blackmun pointed out in his concurring opinion, swimming pools "are a general municipal service of the nice-to-have but not essential variety, and they are a service, perhaps a luxury, not enjoyed by many communities." (91 S.Ct. 1947) On the other hand, indoor plumbing, one of the several city services treated in *Hawkins*, has passed beyond the novelty or luxury stage.

As to Respondent, City of Houston, the case at bar concerns the propriety *vel non* of issuing a building permit and/or whether or not, and if so, where and how, to construct a sanitary sewer—all matters clearly within the constitutionally contemplated and permissible ambit of the local police power (as will be more particularly discussed below), thus there is no significant distinction between *Kirschke* and the case at bar insofar as the question of state *vis-vis* federal jurisdiction is concerned. It is submitted, therefore, that under the doctrine of *Erie Ry. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, (1938), Texas law should govern.

The Petitioners cannot prevail under the laws of Texas can be demonstrated in the following outline:[4]

A. In Texas, a municipality is immune from liability to respond in damages for negligence of omission or commission in the performance of a governmental, as distinguished from a proprietary, function. *City of Dallas v. Smith*, 130 Tex. 225, 107 S.W.2d 872 (Tex. Sup. 1937). "Governmental immunity is a viable legal principle in Texas," *Rodriquez v. Medical Arts Hospital*, 437 F.2d 1023, 1024 (U.S.C.A., 5th Cir. 1971), and has but recently been reaffirmed by the Supreme Court of Texas. *City of Houston v. George*, ____S.W.2d____ (Tex. Sup., March 22, 1972).[5]

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4. "It is our view that a federal district court in an Erie case may, in making a vicarious determination of state law, base its conclusion upon all relevant sources to which the state courts would themselves look." *Tompkins v. City of El Paso*, 449 F.2d 842, 844 (U.S., C.A. 5th Cir. 1971).

5. "This is not to say that the federal courts cannot be innovative or impart new direction to state law in diversity cases, rather

B. The furnishing of sanitary sewerage facilities, as well as the act of constructing sewage disposal plants, are such immune governmental functions. *Gotcher v. City of Farmersville,* 137 Tex. 12, 151 S.W.2d 565 (Tex. Sup. 1941); *Bowie v. City of Houston,* 259 S.W.2d 765 (Tex. Civ. App. 1953, error ref. n.r.e., per curiam, 152 Tex. 533, 261 S.W.2d 450 [1953]); *City of Houston v. George,* ____S.W.2d ____ (Tex. Sup., March 22, 1972).

C. The granting or refusing of a buliding permit is also an immune governmental function of a municipality. *Kirschke v. City of Houston,* 330 S.W.2d 626 (Tex. Civ. App. 1959, error ref. n.r.e., appeal denied, 364 U.S. 474, 81 S.Ct. 242 [1960]), discussed above.

D. A municipality, not being liable in damages for the foregoing, *a fortiori,* it cannot be enjoined from

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the converse is true. It is, however, improper for the federal courts to disregard the forum state's jurisprudence on the subject of sovereign immunity, especially where that jurisprudence does not evidence a trend toward the position [i.e., toward abrogating the doctrine] taken by the district court.

"The Texas courts have by no means been consistent in their development of the Texas law of sovereign immunity. They have, however, evidenced no indication of an intention to abolish the rule, if indeed a judicial fiat could abolish sovereign immunity in Texas." *Tompkins v. City of El Paso,* 449 F.2d 842, 844 (U.S., C.A. 5th Cir. 1971, parenthetical matter added).

See also: *Little v. Schafer,* 319 F.Supp. 190 (U.S.D.C., S.D. Tex. 1970), wherein, referring to the Courts of Texas, Judge Seals said:

"In their continuing deference to legislative wisdom, those bodies long refused to abrogate the judicially created doctrine of sovereign immunity. Now that the legislature has spoken [by the Texas Tort Claims Act which retained the principle of governmental immunity to all but a few exceptions (none of which are germane here)], *it is inconceivable that the Texas courts will fail to follow the legislators' obvious intent.*" (319 F.Supp. 192, emphasis and parenthetical matter added).

> construing, or mandamused to construct, sewage disposal facilities. *Schulman v. City of Houston,* 406 S.W.2d 219 (Tex. Civ. App. 1966, error ref. n.r.e., per curiam, 412 S.W.2d 219 (Tex. Civ. App. 1966, error ref. n.r.e., per curiam, 412 S.W.2d 34 [1967]).

Very much in point is Ellis v. City of West University Place, 141 Tex. 608, 175 S.W.2d 396 (Tex. Sup. 1943). There, that city, in attempting to enforce its zoning ordinance which was later declared void, had stopped the plaintiff from completing his building for a period of two years. Suit was then brought to collect damages for that delay. The City of West University Place defended upon the theory that its conduct, complained of, was an exercise of its lawful police power, thus a valid governmental function for which it was not liable to respond in damages. The Supreme Court of Texas held for the City, and after reciting that this governmental function was not a "taking" of private property for public use, further stated:

> "The rule of immunity from liability of a city in exercising governmental functions extends to discretionary power and generally there is no liability for damages resulting either from *the failure to exercise, the manner of exercising or for error of judgment in exercising* such discretionary power of a public nature, embracing judicial or legislative function." (175 S.W.2d 398-399, emphasis added).

In the case at bar, if Appellants' pleadings are assumed to be true, the worst that can be said about the City of Houston is that it was guilty of errors of judgment in the exercise of its police power. For this it would be immune as was the City of West University Place in *Ellis,* supra.

It is submitted, therefore, that Petitioners have not alleged a cause of action for which recovery could be had under the laws of Texas.

WHEREFORE, PREMISES CONSIDERED, Respondent, City of Houston, prays that certiorari should in all things be denied; alternatively certiorari should be denied as to it.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joseph G. Rollins, Senior Assistant City Attorney, for the City of Houston, Texas, and as an attorney of record in subject case, admitted to practice before the Supreme Court of the United States, do hereby certify that two true and correct copies of the foregoing Brief of Respondent, City of Houston, Texas, in Opposition were this 16 day of May, 1972, served upon each counsel of record for the other parties herein, to-wit:

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by depositing same in the United States mails, postage prepaid, certified mail, return receipt requested.

Joseph G. Rollins

JOSEPH G. ROLLINS